BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

IMPLEMENTATION OF SECTION 402(b)(1)(A))
) CC DOCKET No. 96-187
OF THE TELECOMMUNICATIONS ACT OF 1996)

COMMENTS OF CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC. AND TURNER BROADCASTING SYSTEM, INC.

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TURNER BROADCASTING SYSTEM, INC.

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October 9, 1996

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SUMMARY

Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. ("the Networks") are interested in this proceeding because they use video, audio, and other communications channels obtained from the local exchange carriers ("LECs") in the operation of their businesses. While new Section 204(a)(3) is not completely free from ambiguity, it appears clear that Congress did not intend to take the radical step of eliminating the ability of customers to recover refunds from the LECs for unreasonably high charges. And, it seems equally clear that the Commission should not eliminate pre-effective tariff review of LEC tariffs. After all, as the Commission has recognized only recently, for now the LECs remain dominant carriers in the provision of local exchange services.

Taking into account the structure of new Section 204(a)(3), and the complete silence of Congress as to any desire to eliminate the Commission's long-standing authority to order refunds for unreasonably high charges, it is clear that Congress did not intend for the "deemed lawful" language of the new statutory provision to mean anything other than "presumed lawful" in the context of streamlining the Commission's pre-effectiveness tariff review processes. There is no basis in the statutory language itself or the legislative history to indicate that Congress intended the "deemed lawful" language to be read in such a way as to reverse sub silentio sixty years of judicial precedent regarding the abilities of customers to seek refunds for unreasonable charges.

The Commission also solicits comment as to whether it should eliminate pre-effectiveness review of streamlined LEC tariffs. Because Section 204(a)(1), which was not altered by the 1996 Telecommunications Act, authorizes the Commission to suspend and investigate tariffs "upon complaint," the public has a statutory right to participate in the pre-effectiveness tariff review process. In any event, the scant legislative history for new Section 204(a)(3) indicates that the only purpose of the provision is to "speed up FCC action" and require the agency to "justify its actions," not to eliminate pre-effectiveness tariff review for the only domestic carriers currently classified as dominant by the Commission.

Finally, the Commission should adopt several of the proposals it discusses which would make pre-effectiveness tariff review as meaningful as possible under the abbreviated statutory

notice periods. These include requirements for the LECs to provide more complete summaries of tariffs they file on a streamlined basis and to provide notice by fax as well as by e-mail to those pre-designated business customers affected by rate increases or reduced service options which have requested such notice. The Commission also should apply to LEC streamlined tariffs proposing rate increases the current rule requiring petitions seeking investigation, suspension or rejection of a new or revised tariff filed on more than 14 days' and fewer than 30 days' notice to be filed within 7 days of the tariff filing.

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Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (collectively, "the Networks"), by their attorneys and pursuant to Section 1.415 of the Commission's rules, hereby file these comments on the Notice of Proposed Rulemaking ("Notice") issued September 6, 1996, FCC 96-367, in the above-captioned proceeding. The Commission initiated this proceeding in order to implement Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 which adds new paragraph (3) to Section 204(a) of the Communications Act of 1934 ("the Act"). The Networks are interested in this proceeding because they use video, audio, voice, and other communications channels obtained from the local exchange carriers in the operation of their businesses.

I. STATUTORY BACKGROUND (SECTION III OF NOTICE)

Paragraph 1 of Section 204(a) of the Act authorizes the Commission "either upon complaint or upon its own initiative

without complaint" to initiate a hearing concerning the lawfulness of any new or revised tariff charge or regulation and to suspend the effectiveness of the new or revised tariff for a period no longer than five months pending the completion of a hearing. 47 U.S.C. §204(a)(1). If the hearing has not been concluded within the suspension period, and the tariff changes become effective, the Commission is authorized under Section 204(a)(1) to require the relevant carriers to keep account of all amounts received under the revised tariff and order the carriers upon the completion of the hearing to refund any charges found not to be justified. Id.

A tariff rate that is allowed to become effective is considered the "legal" rate, that is, the rate that the carrier is required to collect and the customer to pay under the filed rate doctrine.[1/] The "lawfulness" of an effective rate, however, remains subject to challenge either pursuant to a Section 204(a)(1) hearing, a complaint proceeding initiated pursuant to Section 208 of the Act, or an investigation established under Section 205 of the Act. If the Commission determines that some element of the effective tariff is unlawful, the Commission may order the filing carrier to pay damages. 47 U.S.C. §207. The Supreme Court has held, however, that once an agency has determined a tariff rate to be "lawful" after investigation, the

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[1/] See Arizona Grocery Co. v. Atchison, T. & S.F. Railway Co., 284 U.S. 370, 384 (1932).

agency generally may not retroactively subject a carrier to refund obligations if the agency subsequently declares the tariff rate to be unreasonable.[2/]

II. CONGRESS EXPRESSED NO INTENTION TO MODIFY RADICALLY FOR LOCAL EXCHANGE CARRIERS THE LONG-STANDING STATUTORY SCHEME GOVERNING ALL OTHER COMMUNICATIONS CARRIERS (SECTION III OF NOTICE)

On its face, the language of new Section 204(a)(3) does not purport to modify the long-standing statutory scheme of carrier-initiated tariff filings, pre-effective tariff review by the Commission on its own initiative or upon complaint of interested parties, and potential refunds if carrier tariffs which have been allowed to become effective are found unlawful after investigation and opportunity for hearing. New Section 204(a)(3) merely formally extends to dominant local exchange carriers ("LECs") a variation of the "streamlined" tariff filing mechanism which the Commission has utilized in one form or another for over a decade:

> (3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under [Section 204(a)(1)] before the end of that 7-day or 15-day period as appropriate.

[2/] Arizona Grocery, 284 U.S. at 389-90.

Despite the clear Congressional intent to require streamlined tariff filing procedures to be made available to the LECs, ambiguity arises under new Section 204(a)(3) because the phrase "deemed lawful" is used in a context which arguably is inconsistent with its historical meaning. As discussed previously, under long-standing judicial precedent a tariff rate which is allowed to become effective is considered merely a "legal" rate, not a "lawful" rate. Only after a tariff rate has been found just and reasonable after hearing is it considered a "lawful" rate.

In the Notice, the Commission discusses how one of the possible interpretations of the phrase "deemed lawful" could mean that the Commission is precluded from awarding damages for the period that a streamlined tariff is in effect prior to the completion of an investigation or complaint proceeding to determine whether the tariff is unlawful. Notice at para. 9. Neither the statutory language nor the legislative history, however, provides any indication that Congress intended such a radical modification of the pre-existing statutory scheme or a reversal of 60 years of judicial precedent starting with the Supreme Court's Arizona Grocery decision. The sparse legislative history cited by the Commission, Notice at para. 4, does not indicate that Congress intended anything more than what the statutory language provides, the formal extension of the

Commission's existing policy of streamlined tariff review to LEC tariff filings.[3/]

What Congress surely must have intended was that LEC tariffs filed on a streamlined basis are merely to be "presumed lawful," that is, with higher burdens for suspension and investigation in connection with pre-effectiveness tariff review. Such an interpretation not only would be consistent with the existing statutory scheme and the Arizona Grocery doctrine discussed above but is the only way that the statutory language logically can be interpreted.

That Congress intended streamlined LEC tariffs to be "presumed" lawful rather than "deemed" lawful is evidenced by the structure of the new statutory provision. The first sentence of the new statutory provision describes action by the LEC that is discretionary on its part ("a local exchange carrier may file [a tariff change] on a streamlined basis"). Once the discretionary act by the LEC is taken, the second sentence requires that two other actions "shall" occur in the future. The chronological order that the two non-discretionary actions take place is significant. First, the statute requires that upon filing the streamlined tariff "shall be deemed lawful." Second, the statute

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[3/] Contrary to the Commission's suggestion at paragraph 6, by enacting new Section 204(a)(3) Congress also expressed no intent to repeal the Commission's authority under a different provision of the Act (Section 203) to require carriers to defer the effective date of their tariffs up to 120 days. If Congress wanted to limit the Commission's authority in this way, it certainly would have said so more directly.

requires that after the expiration of the requisite notice period the tariff "shall be effective."

It is a contradiction in terms, of course, for a tariff to be "deemed lawful" before it is allowed to become effective. On the one hand, once a tariff rate is deemed "lawful" that is the only rate the carrier may charge. On the other hand, under the filed rate doctrine, a carrier cannot charge the "lawful" tariff rate if the tariff is not effective. The new statutory provision must be interpreted in a way that reconciles this internal inconsistency.

The Notice identifies the manner to resolve this apparent contradiction. Notice at para. 12. The statutory phrase "deemed lawful" should be interpreted to establish higher burdens for suspensions and investigations by "presuming" streamlined LEC tariffs as "lawful." Under this interpretation, a tariff filed on a streamlined basis is "presumed" lawful for purposes of pre-effective tariff review. If the streamlined tariff is allowed to become effective without suspension and investigation, the tariff rates become the "legal" rates and must be charged by the carrier. A determination whether the "legal" rates actually are "lawful" rates must await the statutory procedures outlined in other provisions of the Act.

Interpreting the statutory phrase "deemed lawful" as meaning "presumed lawful" in the sense of establishing higher burdens for pre-effectiveness suspension and investigation is

consistent with Congressional intent in at least two respects. First, as explained above, it is consistent with the chronological structure of the new statutory provision. Second, it is consistent with the longstanding precedent of the Arizona Grocery line of cases and, therefore, does not result in the sub silentio reversal by Congress of 60 years of judicial precedent concerning the Commission's authority to provide refunds of unlawfully high carrier charges. Indeed, it is illogical that Congress intended to single out the LECs, the only domestic carriers the Commission says retain market power to control prices,[4/] as the only category of regulated domestic carriers which would be exempted from any refund liability for unreasonably high rates.

Construing new paragraph (3) to preserve the Commission's statutory refund authority is especially important to end users whose ability to obtain refunds of LEC overcharges should not be compromised in the absence of expressed Congressional intent to effect such a result. While the enactment of the Telecommunications Act of 1996 was intended, in part, to encourage new entrants into the local exchange

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4/ The Commission recently reaffirmed that LECs retain market power in the local exchange market. See, e.g., Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 96-319, August 13, 1996, at para. 42; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, FCC 96-309, July 18, 1996, at para. 6.

marketplace, Congress recognized that in most instances today end users remain dependent upon the LECs for local facilities. It makes no sense that Congress intended to deprive customers of the opportunity to obtain refunds from LECs, while such a remedy remains applicable to other carriers subject to more competition.

III. THE COMMISSION SHOULD NOT ELIMINATE PRE-EFFECTIVE REVIEW OF LEC TARIFFS (SECTION V OF NOTICE)

In implementing the abbreviated tariff notice periods prescribed by new Section 204(a)(3), the Commission solicits comments on whether, instead of continuing its current practice of reviewing LEC tariff filings before they become effective, the Commission should change its procedures to review streamlined tariffs only after their effective date and at that time determine whether it is necessary to initiate a tariff investigation pursuant to Section 205 of the Act. Notice at para. 23. The Networks oppose the proposal to eliminate pre-effective review of streamlined LEC tariffs.

As discussed in the preceding section, the Commission would err if it interpreted the statutory phrase "deemed lawful" in such a way as to preclude the Commission from awarding damages with respect to a LEC tariff that becomes effective on a streamlined basis. If, nevertheless, the Commission were to adopt that interpretation, the elimination of pre-effective review of LEC tariffs would compound the error. Customers not only would be precluded from trying to prevent unreasonably high

tariff rates from becoming effective in the first place but also would be precluded from receiving refunds if upon post-effective review the Commission determined the tariff rates to be unlawfully high. Congress expressed no intent to shift the delicate statutory balance between carriers and customers so radically in favor of the local exchange carriers, the only domestic carriers still classified by the Commission as dominant carriers with market power.[5/]

Elimination of pre-effective tariff review also would be inconsistent in and of itself with the little legislative history of Section 204(a)(3) which exists. Senator Dole stated that the purpose of new paragraph (3) is to "speed up FCC action" and require the FCC to "justify its actions." See Notice at para. 4 n.11. Implicit in this statement is that the Commission retain its authority to act before the tariffs become effective. Otherwise, there is no reason why Congress did not prescribe that streamlined LEC tariffs become effective immediately upon filing, as it had done with operator service provider informational tariffs. See 47 U.S.C. §226(h)(1)(A). Moreover, the public's right to participate in the pre-effective review is guaranteed by pre-existing -- and unchanged -- Section 204(a)(1) which authorizes the Commission to suspend and investigate tariff proposals "upon complaint." 47 U.S.C. §204(a)(1).

5/ See footnote 4 supra.

To make pre-effective review of LEC tariffs as meaningful as possible under the abbreviated statutory notice periods, the Commission should adopt several of the proposals it discusses in paragraphs 25 through 28 of the Notice. First, the LECs should be required to provide more complete summaries of the tariffs they file on a streamlined basis. The summaries should detail on a service-by-service basis (for example, television and audio services should be addressed separately) the rate or service impact of the proposed tariff and the reasons in support of the proposed changes. Second, streamlined tariff proposals that contain both rate increases and rate decreases should be filed on the longer statutory notice period, 15 days, so that the opportunity of customers to challenge rate increases is not compromised. Third, carriers should be required to provide notice by fax as well as by e-mail to those pre-designated business customers affected by rate increases or reduced service options who formally requested such notice. In light of the very abbreviated pleading cycles, the Networks also recommend that the Commission require all petitions and oppositions to be hand-delivered or faxed to the affected parties on the same day that they are filed with the Commission.

Finally, the Commission should not adopt its proposal to establish a uniform 3-day filing period for petitions to suspend and reject LEC tariffs filed on a streamlined basis, regardless whether the statutory notice period is 7 or 15 days.

The Commission's current rules reasonably distinguish among the different potential notice periods in establishing petition filing periods, and the Commission should retain those distinctions. The Commission should preserve its current rule requiring petitions seeking investigation, suspension or rejection of a new or revised tariff made on more than 14 days' and fewer than 30 days' notice to be filed and served within 7 days of the tariff filing. 47 C.F.R. §1.773(a)(2)(ii). The Commission's filing period rules have been in effect for several years, and Congress' awareness and approval of these filing period distinctions must be presumed. Customers -- who are very unlikely to file petitions against proposed rate reductions -- require at least the 7 days provided under the Commission's existing rules to prepare a meaningful petition challenging a streamlined LEC tariff proposing a rate increase.

IV. CONCLUSION

For the foregoing reasons, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. urge the Commission to take action consistent with the views expressed herein.

Respectfully submitted,

CAPITAL CITIES/ABC, INC.
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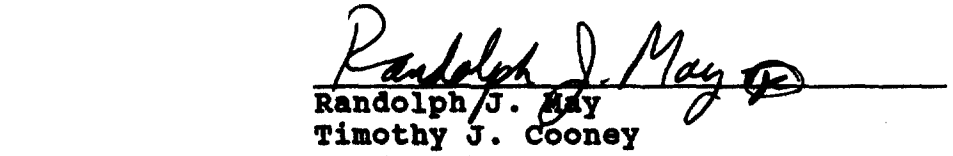

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October 9, 1996

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CERTIFICATE OF SERVICE

I, Teresa Ann Pumphrey, hereby certify that a copy of the foregoing Comments of Capital Cities/ABC, CBS, NBC and TBS was served by first-class mail, postage prepaid, this 9th day of October, 1996 on the following persons:

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